

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 889 of 1998

with

CRIMINAL APPEAL NO.890 OF 1998

with

CRIMINAL APPEAL NO.629 OF 1998

with

CRIMINAL MISC. APPLN NO.1678 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

KALA BAVABHAI SISODIYA

Appearance:

Mr. P.G.Desai, PUBLIC PROSECUTOR for APPELLANT

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE A.K.TRIVEDI

Date of decision: 20/04/99

ORAL JUDGEMENT(Per B.C.Patel, J.)

Criminal Appeal no.629 of 1998 is preferred by the accused no.1- Kala Bavabhai Sisodia and the accused

no.2- Raja Bavabhai Sisodia of Sessions Case no.70 of 1996 who were tried with their co-accused Jivabhai Bavabhai Sisodia-the accused no.3 for offences punishable under Secs.302, 323, 504, 506(2) read with Sec.114 of the Indian Penal Code by Additional Sessions Judge, Junagadh. The learned Additional Sessions Judge on appreciation of evidence convicted the original accused no.1 for an offence punishable under Sec.304 Part I of the Indian Penal Code and sentenced the accused no.1 to rigorous imprisonment for a period of six years and a fine of Rs.500/- (in default of payment of fine, 3 months R.I.). The accused no.1 was held guilty for an offence punishable under Sec.323 of the IPC and was sentenced to three months simple imprisonment and a fine of Rs.100/- (in default of payment of fine 15 days S.I.). The accused no.2 Raja Bavabhai Sisodia was held guilty for an offence punishable under Sec.323 of the IPC and was sentenced to undergo simple imprisonment for a period of 3 months and fine of Rs.500/-(in default of payment of fine 15 days S.I.) by order dated 30th June, 1998. The State has preferred Criminal Appeal no.889 of 1998 under Sec.377 of the Criminal Procedure Code and prayed for enhancement of sentence awarded by the learned Additional Sessions Judge for an offence punishable under Sec.304 Part I of the IPC. The State has also preferred Criminal Appeal no.890 of 1998 against the order of acquittal recorded by the learned Additional Sessions Judge acquitting all the accused respondents nos.1 to 3. Misc. Criminal Application no.1678 of 1999 is preferred by the accused-appellant no.1 of Criminal Appeal no.629 of 1998 for bail. It appears that at the time of admission of the appeal, the learned Single Judge has observed that the appellant no.1 is in jail for the last three years and considering the prayer for expeditious hearing, the learned Single Judge directed the office to see that the paper-book is prepared as expeditiously as possible preferably on or before 31st December, 1998 and directed the office to place the matter for final hearing in the third week of January, 1999. It appears that thereafter, the State preferred the aforesaid appeals and that is how all the matters are placed before Division Bench and are taken together for hearing.

2. Jivabhai Sarmanbhai PW 2 has stated before the Court that while returning home he passed through the house of the accused. The accused called upon the witness to cut the pipal tree whereupon the witness replied that as the cultivation work is over at present nothing can be done. Thereupon, Kala Bava, the accused no.1 delivered a blow by means of a stick which landed on the thumb. On raising the shouts, his son Rambhai, his

wife, Lakhman and his grandson Nanu, all came. He further deposed that Lakman Mulu and Kuman Jiva rescued. Thereafter, they all went to their respective houses. He deposed that in the incident Rambhai as well as his wife sustained injuries. As he sustained injury on the head, he became unconscious. He has stated that after the incident he went to the police station for lodging information in the company of Lakhman Mulu. He has deposed that Nanu, his grandson was taken to Government Dispensary at Malia for treatment. He has stated that he was required to be removed to Junagadh for further treatment and from there to Ahmedabad. The said Nanu unfortunately died at Ahmedabad.

3. Jivuma Jivabhai PW 5 has stated before the Court that altercation took place with regard to cutting of pipal tree. Her version is that after hearing hubbubs she went out and saw that blows were being delivered on the person of her husband. She has deposed that in the company of Nanu her grandson, she went there and Kala Bava, the accused no.1 delivered a blow on the person of Nanu which landed on his head. She has referred to the arrival of others, namely Kuman Jiva and Lakhman Mulu. She stated that during the night hours there was rain and on account of rain the road or the passage became slushy. Her husband had a stick with him. She admitted that she did not know as to what talk took place between the accused and her husband when he was stopped. She has admitted that before the police she has not stated that she heard the conversation between the accused and her husband and that the accused told to cut the pipal tree. She has also admitted that she has not stated before the police that her husband stated that as cultivation is still to be completed, the pipal tree cannot be cut and that the accused were abusing. Nanu was taken to the house. Thereafter, Jivabhai came. About the nature of the stick contradiction is proved. She has denied the suggestion that she has not seen the incident or that she did not hear the conversation.

4. Rambhai Jivabhai, PW 6 has disclosed the same version. He has further stated that deceased Nanubhai was vomiting, therefore, Nagdan, his younger brother, took him to Maliya at about 2.00 p.m. The witness and Lakhman went to Maliya where it was learnt that health of Nanu became delicate. Nagdan took Nanu for further treatment. At about 6.30 p.m., the witness reached Junmagadh. Deceased Nanu was taken to Ahmedabad where he died. He has admitted that he has not stated before the police that accused Raja Bava delivered a blow by means of a stick on the right hand of Nanu and that Jivabhai

Bavabhai also delivered a blow by means of a stick on the right hand of Nanu. The witness has denied the suggestion that when Doctor examined, he conveyed the information that on account of stone throwing he sustained the injuries. He has denied the suggestion that he did not sustain injury by means of stick.

5. Bhikabhai Jivabhai, PW 7 is examined by the prosecution but he has not seen the incident, and therefore, his evidence need not be referred to.

6. Mr. Nanavaty, learned Sr. Advocate appearing for the appellant submitted that the informant was armed with stick and the accused intended to cause injury by means of a stick on the person of the informant, namely Jivabhai. He submitted that even this cannot be accepted because there was conversation and there was no earthly reason for the accused to deliver blows by means of a stick. He submitted that something must have preceded which is not being narrated by the witness before the Court. Be that as it may, the fact remains that accused Kala Bava delivered a blow on the person of Jivabhai which landed on the thumb. He submitted that it is not possible to accept the version put forward by this witness because he himself has stated that he became unconscious. It appears that he may not have become fully unconscious but on account of giddiness he has stated so before the Court. First Information is lodged by witness Jivabhai. It was submitted that Nanu arrived at the place later on and as he tried to intervene the stick blow landed on his head. Jivuma has stated that her husband became unconscious after sustaining injuries. It is also clear that witness Jivuma and Nanu went to the scene of occurrence. There is nothing in the evidence to show that any of the accused had an intention to cause injury to Nanu. May be that as he tried to intervene, he sustained a blow. Rambhai Jivabhai, PW 6 has stated that he went there and was trying to rescue and in that process witness sustained injuries at the hands of Kala Bava and Jiva bava. Nanu also sustained stick blow at the hands of Kala Bava in this process. Thus, from the testimony of these witnesses, it transpires that accused were standing near their house and when Jivabhai Sarmanbhai, PW 2 was passing nearby their house, they took up the quarrel on the ground of cutting pipal tree and accused no.1 delivered a blow by means of a stick which landed on the thumb of Jivabhai. Others came and they also sustained injuries when they intervened.

7. It is at this stage necessary to consider the medical evidence. Kumuben Rathod, PW 1, medical officer,

Maliya Community Health Centre deposed before the Court that Nanubhai Lakhmanbhai(i.e. Nanu) was examined by her on 28-7-1995 at 9.30 a.m. and found that on the person of Nanu there were injuries such as (1) bruise on right side of face at outer angle of right eye of size 3 cms x 1/4 cms (2) bruise on right head frontal region above right ear of size 4 cms. x 3 cms. x 1/4 cm. and (3) abrasion of left forearm dorsal aspect middle region 4cms. x 1/4 cm oblique in nature. On account of complaint of nausea, vomiting and giddiness, he was admitted in the hospital. As per the certificate, he was referred to Junagadh Civil Hospital at about 1.00 p.m. According to the opinion of the Medical Officer the injuries could have been caused by hard and blunt substance. At about 10.00 a.m. on the same day Jivabhai Sharmanbhai was examined by her. On the person of Jivabhai there were following injuries:

- (1) CLW on right palm outer aspect at dorsal side below base of thumb of size 2 cms x 1 cm. by deep subcutaneous tissue, oblique direction.
- (2) Bruise on left side of frontal region at neck above left ear of size 2 cms x 2cms x 1/4 cm.

According to the Medical Officer, the injuries were fresh and simple in nature which could have been caused by hard and blunt object. The said Medical Officer examined Rambhai Jivabhai at 2.30 p.m. on the same day and found following injuries:

- (1) Bruise on vertex region at head of size 3 cms. x 2 cms. x 1/4 cm.
- (2) Abrasion on vertex region 1 cm. above swelling of size 1/2 cm. x 1/2 cm. oval shape.

According to the Medical Officer injuries were fresh and simple in nature which could have been caused by hard and blunt object.

8. According to the Medical Officer Maluben was examined on 29-7-1995. There was one CLW on left middle finger on dorsal aspect on base of size 1 cm. x 1/4 cm. x deep to muscle. Pus was present. Injury was oblique in direction. So far as age of injury is concerned, the Medical Officer has opined that it was 1 to 2 days old and was simple in nature which could have been caused by hard and blunt object. The Medical Officer has stated that history is not mentioned in the case papers. She has also stated that it is not stated anywhere as to who

brought Nanu Lakhman. It is mentioned in case papers that Nanu Lakhman vomitted at his house about 3 to 4 times. She has stated that there was not a single bleeding injury on the person of Nanubhai. The injuries on the person of Nanubhai, Rambhai Jivabhai and Jivabhai Sharmanbhai were similar in nature. The witness has stated that the injuries indicated in the certificate of Jivabhai Sharmanbhai and Maluben Jivabhai were simple in nature and could have been inflicted by the person himself. Injuries sustained by Jivabhai and particularly injury no.2 was more possible by fall. The Medical Officer has stated that on the person of Nanubhai no incised wound was noted. It is stated by the Medical Officer that the incised wound could have been caused by dharia or by a pointed weapon. So far as the bruises are concerned, they could have been caused by the stick portion of a dharia. Rambhai Jivabhai had an injury on head which could have been caused by throwing of a stone. She has also stated that Maluben sustained an injury which could have been caused by blunt portion of dharia or by a stone if thrown on the head of the person. She has stated that the injuries on the person of Nanubhai could have been caused by stone throwing.

9. The prosecution has examined Dr. Sureshkumar Dhirajlal Pandya, PW 3, Medical Officer, Civil Hospital, Junagadh who examined Nanubhai Lakhman. He has stated that on examination, the injured was found semiconscious. He has noted bruise 3cms. x 2cms. on occipital region of the skull. Xray of the skull was taken and on examination no injury to the bone was noticed. He has stated that he has seen the report forwarded by Medical Officer of Maliya Hospital. The Medical Officer has positively stated that on examining the X-ray no fracture of the skull was noticed. There was not a single injury which could be said to be bleeding injury. He has stated that the injuries noted in Exh.23(certificate issued by the Medical Officer, Junagadh) could have been caused by a stone or by a fall. The witness was put a specific question by showing sticks articles nos.1 to 3 to the effect that if a person sustained an injury with the weapon shown whether it would be a bleeding injury? In answer to that it was stated that if it was in the nature of bruise, there was no possibility of blood oozing out but if it was contused lacerated wound there were all possibilities of blood oozing out. Witness was not able to state whether injury if caused by stick article nos.1 to 3 would be either CLW or bruise. However, witness was certain looking to the injury that there was no sufficient force to cause a fracture. Thus, in short, Medical Officer has opined that as there was no fracture

of bone and the injury might have been caused by means of stick, that injury was simple in nature and no force was used for causing that injury.

10. Dr. B.S. Patel of B.J. Medical College, Ahmedabad who performed the postmortem has stated in the postmortem report that there was an incised wound of 2.5 cms. x 0.5 cms on the middle anterior aspect of left forearm with lower margin bevelled and upper margin undermined placed obliquely and both angles acute. There was only one injury shown in column no.17. On internal examination, the Doctor has stated before the Court that on the right side temporal parietal region, blood was spread out in the region of 8 x 7 x 0.5 cms. The Doctor noticed (1) fractures on the right side of anterior cranial fossa and middle cranial fossa (2) Fractures on the right side of temporal and parietal bone. There was thick extradural haemorrhage over 10 x 8 x 2.5 cms on right temporo parietal region. Doctor has drawn the picture to indicate the fractures at the base of the skull and right side of the head. There was compression of brain. There was subarachnoid haemorrhage all over the brain. The Medical Officer has admitted that injury could have been caused by stick(article no.1). He has stated that it is possible that internal injury, namely, the fractures shown in the postmortem note could have been caused by stick and even it could have been caused by article no.2. According to the Medical Officer, the internal injury was sufficient in the ordinary course of nature to cause death. However, the Medical Officer has stated that the fractures indicated in figure at page 5 of Exh.39 could be noted only at the time of postmortem note. He has stated that it could have been noted by Neurosurgeon on reading X-ray. The Medical Officer has stated that the incised wound which is noted in column no.17 is equally possible by a fall on the ground and in coming in contract with pointed stone. The witness has stated that it would not be possible for him to say the approximate time of the fractures sustained by the injured which he noticed during internal examination. He has stated that the fracture could have been noted in the X-ray. The Medical Officer has stated that the injury, namely, the incised wound could have been caused by sharp cutting instrument. He has also admitted that if the blows by means of articles nos.1 and 2 are inflicted on the person, the nature of injury would be CLW. The witness has admitted that internal injury which he has noted could have been caused by a fall. He has also admitted that the fractures which he noticed could have been caused by one impact. He has not noticed any injury on occipital region of the deceased. He has admitted

that looking to the nature of injury sustained there was possibility of death. He has stated that he cannot say that injury sustained by the deceased on the head could have been caused by articles nos.1 and 2 positively as no external injury was noticed by him on any part of head. He has stated that he cannot say that opinion was received from Junagadh Hospital to the effect that there was no fracture of skull.

11. On the basis of the medical evidence, Mr. Nanavaty submitted that the Doctor who performed the postmortem has noticed only one injury on the person of the deceased and that too the injury which could have been caused by sharp cutting instrument. He further submitted that as per medical opinion, injury could have been caused by one impact and could have been caused by fall. It is required to be noted that the Medical Officer has stated that the fracture could have been only noted during the postmortem examination while examining the internal injuries, though he has stated that on reading the X-ray one could find the fracture if sustained. There is evidence of Medical Officer-Dr. Pandya, PW 3 who examined Nanu at Junagadh and reading the X-ray he stated that there was no fracture. It is clear that when Nanu was examined by one medical expert there was no fracture and that too with the aid of X-ray and later on on internal examination fractures were noted and about the age of injury the medical offer was not able to state. It is under these circumstances, Mr. Nanavaty submitted that even if the prosecution case is accepted that incident in question took place and deceased Nanubhai intervened and sustained the injury, it cannot be inferred that there was any intention on the part of the accused to deliver the blow so as to cause his death. The learned Additional Session Judge, Junagadh has convicted the accused for an offence punishable under Sec.304 Part I of IPC. If the act by which the death is caused is done with intention of causing death, then Sec.304 Part I would be applicable. In the instant case, we find that the bodily injury which was caused was likely to cause death. It is required to be noted that the Medical Officer has clearly stated in the cross examination that the bodily injury sustained by the deceased was likely to cause death. There was only one injury noted by the Doctor in column no.17. It is under these circumstances, Mr. Nanavaty submitted that the appeal should be allowed and conviction recorded under Sec.304 Part I should be quashed and set aside. According to him, even if the prosecution case is accepted, the prosecution cannot urge that the accused has committed an offence punishable under Section 304,

Part I, IPC.

12. Mr. K.P. Raval, learned Public Prosecutor who appeared in the matter after reading the evidence and particularly, the medical evidence was not in a position to substantiate the contention raised in the memo of appeal. According to Mr. Raval, if the blow is delivered and person has died, the trial Court ought to have convicted for an offence punishable under Section 302 of the Indian Penal Code. According to his submission, even one blow with a stick is sufficient if the death is caused to convict a person under Sec.302, IPC. We are required to consider the totality of circumstances and the medical evidence. As we have pointed out earlier, in the instant case, the medical evidence reveals that the injury was likely to cause death. In the instant case, there was no intention on the part of the accused no.1 to cause injury to Nanubhai the deceased. He sustained injury as he intervened.

13.. In view of the medical evidence which we have discussed hereinabove, it is clear that the accused caused a bodily injury which was likely to cause death, and therefore, offence would be punishable under Sec.304, Part II of the Indian Penal Code.

14. In view of the aforesaid discussion, the appeals preferred by the State are required to be dismissed. So far as the appeal preferred by the accused no.1 is concerned, he has been convicted for an offence punishable under Sec.304, Part I of IPC and is sentenced to R.I. for six years and fine of Rs.500/-. He is also convicted for an offence punishable under Sec.323 of the IPC. He is in jail since his arrest and he has undergone total period of 3 years 9 months and 5 days. Looking to the nature of the incident and unintentional blow, Mr. Nanavaty submitted that in the instant case, sentence already undergone would meet the ends of justice. It is clear from the evidence that there was no intention on the part of the accused to cause injury to Nanu but as he intervened, he became a victim. It cannot be said that the accused caused the injury with an intention to cause the death of Nanu. The accused no.2 has already undergone the sentence. No untoward incident has been reported and considering all these aspects, when we are modifying the order of conviction from Sec.304 Part I, IPC to Sec.304 Part II, IPC, we are of the view that the sentence undergone will meet the ends of justice. Sec.357 of the Criminal Procedure Code provides for compensation. Sub-section 3 reads as under:

" When a Court imposes a sentence of which fine does not form part, the Court may, when passing judgment order the accused person to pay , by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."

For the reasons stated in the judgment, it is directed the accused no.1 to pay compensation of Rs.50,000/-to the heirs of deceased Nanubhai. Amount of Rs.20,000/- shall be paid within a period of one month. Amount of Rs.15,000/- shall be paid thereafter within a period of two months and the remaining sum of Rs.15,000/shall be paid within a period of four months from the date on which the amount of Rs.20,000/- is deposited. Assurance is given to the Court that the amount shall be paid as stated at the Bar by the learned Counsel. Mr. Nanavaty submitted that Civil Suit no.37/96 is pending in the Court of Civil Judge(S.D.), Veraval for compensation. In view of sub-clause 5 of Sec.357 at the time of awarding compensation in any subsequent Civil Suit while granting the relief the Court shall take into account any sum paid or recovered as compensation , and therefore, if the decree is passed obviously, this amount will have to be taken into consideration by the trial Court. So far as the order of fine is concerned, it is maintained. Mr. Nanvaty states that the accused no.1 shall file an undertaking before this Court with regard to time bound programme for making payment. The amount shall be deposited in the Sessions Court at Junagadh and the Sessions Court after verifying shall pay the amount to the heirs of deceased Nanubhai. Undertaking to be filed on or before 21st May, 1999.

16. Accordingly, appeal preferred by the appellants-accused stands partly allowed. Order of conviction passed against the accused no.1 for an offence punishable under Sec.304 PartI stands altered to Sec.304 Part II,IPC. So far as order of conviction passed against the accused no.1 under Sec.323 of IPC is concerned stands confirmed. Sentence of fine under both the Sections is maintained. However, sentence of imprisonment stands modified to one already undergone i.e. 3 years 9 months and 5 days. Sentence of imprisonment to run concurrently stands confirmed. So far as appellant no.2 is concerned he has already undergone the sentence and hence order is not interfered

with. Appeals which are preferred by the State are dismissed.

In view of the order passed in the appeal preferred by the accused-appellant Misc. Criminal Application has become infructuous and stands rejected.

stanley-bcp.